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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5877

JERRY LEANDER POE, Appellant

v.

THE STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME
COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

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Eisenstadt v. Baird, 405 U.S. 438, 92S.Ct. 1029, 31 L.Ed.2d 349 (1972).

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

State v. Lair, 62 N.J. 388, 301 A.2d 743 (1973).

State v. Robinson, 9 N.C.App. 433, 176 S.E.2d 253 (1970).

Statutes:

North Carolina General Statutes, §14-177.

North Carolina General Statutes, §14-184.

Other Authorities:

Annotation, 58 ALR 3d 636 (1974).

KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE.

PSYCHOLOGY TODAY, July 1970.

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant Jerry Leander Poe, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Supreme Court of North Carolina in this case, and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals in 40 N.C.App. 385, 252 S.E.2d 843, and is included herein as Appendix A.

The Judgment of the Supreme Court of North Carolina, dismissing the appellant's appeal from the decision of the Court of Appeals and denying his petition for discretionary review of said decision appears in 298 N.C.____, 259 S.E.2d 304, and is included herein as Appendix B.

GROUNDS OF JURISDICTION OF SUPREME COURT

The North Carolina Court of Appeals affirmed Poe's conviction of crime against nature under N.C. G.S. §14-177 and his sentence of five years imprisonment, holding that the statute extended to private, consensual heterosexual acts, and that so construed, the statute did not violate his right to privacy guaranteed by the United States. The Supreme Court of North Carolina declined to review the decision, and entered judgment dismissing Poe's appeal.

The final judgment of the North Carolina Supreme Court was entered on October 2, 1979.

The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal under 28 U.S.C. §1257(2).

STATUTE INVOLVED

North Carolina General Statutes §14-177 provides:

> "Crime against nature. - If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court."

QUESTION PRESENTED

Whether the imposition of criminal liability upon Poe for engaging in a private, consensual act of fellatio with a woman violates his right of privacy guaranteed him by the Fourteenth Amendment and other amendments to the United States Constitution.

STATEMENT OF THE CASE

Poe was tried upon an indictment charging him with rape and crime against nature.

At trial, the evidence for Poe and for the State agreed that on the afternoon of November 4, 1977, the prosecutrix performed fellatio on Poe in an abandoned warehouse in Durham, North Carolina.

The prosecutrix contended that Poe called her over to his car and told her to get in, and that he was armed with a small, black pistol stuck halfway under his coat. He drove her to the warehouse, made her go in, raped her, then forced her to perform fellatio on him. She followed Poe out to his car, and got in with him. He made her get out, and drove off. This made her mad, so she copied down his license plate number and called the police.

The detective who investigated her complaint testified that Poe told him that he did not have a gun, and had never had one, and that Poe went with him voluntarily to the Investigations Bureau and gave him a statement denying that he raped her, had coitus with her, or forced her to do anything, but admitting that fellatio took place.

Poe testified in his own behalf that the prosecutrix flagged him down on the street and solicited his company for "a few drinks and a little sex." She appeared to have been drinking, and he smelled whiskey on her. Inside the warehouse, he learned that she was on her monthly period and declined to have sexual intercourse with her. She suggested that he permit her to perform fellatio on him, and he consented. She unzipped his pants and did perform fellatio on him; he broke off the liason before climax because he heard a car approaching the building, and left.

The gynecologist who examined the prosecutrix on the night of the alleged rape testified that he did a complete physical examination, and found no evidence of trauma, violence or force, nor any evidence that the prosecutrix had engaged in sexual intercourse that day. Because of a prior history of psychiatric disorder, he obtained a psychiatric consultation with the prosecutrix that night.

The prosecutrix was twenty-two years old, and had a record of admissions to state mental hospitals. The psychiatrist who examined her on the night of the alleged rape testified that he found her paranoid schizophrenic, and that the same diagnosis had been made on prior visits to the emergency room. His impression that night was that her condition was fairly well controlled by medication, but that she exhibited a moderate degree of paranoia. In his opinion, there was a sexual dimension to her paranoia.

The trial court dismissed the second-degree rape charge at the close of the State's evidence, but let the crime against nature charge go to the jury.

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

Prior to arraignment, on November 30, 1977, Poe filed the following written motion in Superior Court:

> NOW COMES THE Defendant by and through his attorney, pursuant to G.S. Sec. 15A-954, and moves the Court that the charge of crime against nature be dismissed on the ground that G.S. Sec. 14-177 is unconstitutional on its face, in that the said statute prohibits sodomic conduct between consenting adults contrary to the rights of privacy guaranteed by the United States Constitution.
>
> This 29th day of November, 1977.
>
> S/WILLIAM V. McPHERSON, JR.
> Attorney for the Defendant"
>
> Record on Appeal in the North Carolina Court of Appeals [hereafter, R.], 6.

On January 6, 1978, the motion came on for hearing in Superior Court. After oral argument, the Court made the following ruling:

> "COURT: As to that motion, I see the problem this is going to present at trial based on the allegation 'against her consent.' But I am not prepared to today declare 14-177 unconstitutional. I am not prepared to dismiss the charge based upon that ground." (R.7.)

The matter was called for arraignment and trial on January 30, 1978. The motion to dismiss was renewed and again denied (R. 7-8).

Prior to closing arguments, Poe's attorney tendered a requested instruction to the Court, to the effect that if the jury found that the prosecutrix consented to perform fellatio on Poe they should return a verdict of not guilty. The requested instruction was denied (R.31). After the court had charged the jury, but prior to the jury retiring, Poe's attorney made the following motion:

> "MR. McPHERSON: The Defendant moves the Court at this time to direct the jury to return a verdict of not guilty for the reason that all of the believable and competent evidence in the case indicates that the act of fellatio took place with the consent of the prosecuting witness, that GS Section 14-177 may not be interpreted to prohibit sodomic conduct in a private place between two consenting adults for the reason that such interpretation would offend the Fourteenth Amendment of the United States Constitution and various Supreme Court decisions interpret that.
>
> COURT DENIED MOTION.
> DEFENDANT EXCEPTS.
> EXCEPTION NO. 5.
>
> MR. McPHERSON: At this time the defendant would again move the Court to give the jury the tendered instructions.
>
> COURT DENIED MOTION.
> DEFENDANT EXCEPTS." (R. 39-40)

Upon the return of the jury's verdict of guilty of crime against nature, Poe's counsel made the following motion:

> "MR. McPHERSON: I would move the Court that the verdict be set aside and judgment be arrested on the ground that as interpreted and applied in this case today, General Statute 14-177 is repugnant to the United States Constitution for the reason that the evidence clearly shows that this is a consensual act between two adults in a private place and the jury was permitted to return a verdict of guilty, and under that statute on these facts the regulation of such conduct is utterly beyond the police power of the state.
>
> "COURT: Denied and exception." (R. 40-41).

The constitutional objections to the application of N.C.G.S. §14-177 to Poe were brought forward on appeal. In accordance with North Carolina appellate procedure, Poe made the following assignments of error to the North Carolina Court of Appeals:

> "1. Denial of the Defendant's motion to dismiss the crime against nature charge in the indictment; on the ground that G.S. 14-177 is unconstitutional in that it prohibits heterosexual conduct between two consenting adults in a private place. . . .

> "2. Denial of the Defendant's motion to dismiss the crime against nature charge at the close of the State's evidence; on the ground that all of the probative evidence disclosed that the act of fellatio was between two consenting heterosexual adults in a private place, and the State may not constitutionally make such conduct criminal under the Fourteenth Amendment to the United States Constitution. . . ."
>
> "3. Denial of the Defendant's motions for directed verdict of not guilty and to set aside the verdict; on the ground that the evidence established that the act of fellatio was between two consenting adults heterosexual, and in a private place, and the State may not constitutionally make such conduct criminal under the Fourteenth Amendment to the United States Constitution. . . . "
>
> . . .
>
> "5. Failure of the Court to give the Defendant's requested jury instruction that consent is a defense to the charge of crime against nature; on the ground that G.S. 14-177 may not be applied to a heterosexual act of fellatio between two consenting adults in a private place, under the Fourteenth Amendment to the United States Constitution. . . . " (R. 42-43).

The constitutional questions were argued to the North Carolina Court of Appeals and to the North Carolina Supreme Court. Among the questions presented to the Court of Appeals were:

> "1. Does the crime against nature statute (G.S. §14-177) prohibit a man and a woman from engaging in a private act of fellatio by mutual consent?"
>
> "2. Does the right to privacy guaranteed by the United States Constitution preclude the State from imposing criminal liability under G.S. §14-177 on a man for participating in an act of fellatio in a private place with a woman by mutual consent?" (Defendant-Appellant's Brief, 1).

In his Notice of Appeal and Petition for Discretionary Review to the North Carolina Supreme Court, Poe raised and argued the following question:

> "1. The imposition of criminal liability upon the Defendant under G.S. §14-177 for engaging in a private act of fellatio with a woman by mutual consent violates his right to privacy guaranteed by the United States Constitution."

The constitutional question which Poe now seeks to raise before the Supreme Court of the United States was raised in the courts of North Carolina at the earliest stage of the proceedings against him, and was raised at every stage thereafter. It was raised in the Court of Appeals and in the Supreme Court of North Carolina.

SUBSTANTIALITY OF FEDERAL QUESTION

Poe's case squarely raises the question of the State's power to regulate

consensual, private sexual conduct between heterosexual adults.

Whether a State has such power ought to be decided by the Supreme Court of the United States. No right is more fundamental than the right to be free of State intrusion in private sexual conduct, absent a compelling State interest. The question is one of broad public interest, in light of statistical data which suggests that a majority of the population from time to time engages in heterosexual conduct of the sort for which Poe has been imprisoned.[1] Earlier decisions of this Court suggest that the State does not have the power to regulate conduct such as Poe's. The appellate courts of North Carolina have decided that it does. The decision of the North Carolina courts ought to be reviewed.

It is now generally accepted that under Griswold v. Connecticut, 381 U.S. 479, 85. S.Ct. 1678, 14 L.Ed.2d 510 (1965), the States may not punish consensual sodomic conduct by married persons in private, Annot., 58 ALR3d 636 (1974), State v. Lair, 62 N.J. 388, 301 A.2d 743 (1973). In Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), this Court struck down a Massachusett's statute prohibiting the distribution of contraceptives to unmarried persons on alternative grounds: (1) that the right to privacy enunciated in Griswold is an individual right, arising regardless of the marital relationship, or (2) that there is no rational basis under the Equal Protection Clause to distinguish between married and unmarried persons.

In the instant case, the North Carolina Court of Appeals limited the right to privacy created by Griswold and Eisenstadt, to the use of contraceptives and

1. In 1969, Psychology Today included a research questionnaire in one of its issues directed to the sexual practices and attitudes of its readers. It obtained over 20,000 responses. 77% of the males and 82% of the females who responded indicated that they had participated in fellatio or cunnilingus, PSYCHOLOGY TODAY, July 1970, 39, 43.

The 1948 Kinsey survey found that mouth-genital contacts occur at some time in the histories of nearly 60 percent of all males. The incidence of such behavior was 72 percent of males who had gone to college, 65 percent of males who had gone to high school, and 40 percent of those who had not gone beyond the eighth grade, KINSEY, ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE, 371.

held that the right does not extend to sexual conduct itself, App. A, 3. It further held that the State, consistent with the Equal Protection Clause of the Fourteenth Amendment can draw a classification so as to prohibit fellatio between unmarried heterosexuals without prohibiting the same acts between married couples, App. A, 4.

The state decision overlooks the question whether there is a compelling state interest in proscribing Poe's conduct. Poe's right to privacy is a "fundamental right" that may be invaded by the state upon a showing of a compelling state interest, Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed2d 147, ___(1973). Clearly the state has an interest in forbiding sexual conduct in a public place, or with minors, or sexual assault against an unwilling victim, or sadistic sexual conduct threatening injury to participants. Arguably, the state's interest in protecting the heterosexual family as a predominant societal institution may justify it in imposing criminal sanctions against homosexual activity. None of these interests, however, were threatened by Poe's activity. Nor can the State of North Carolina justify Poe's imprisonment on grounds that it is seeking to regulate extra-marital sexual relations. N.C. G.S. §14-184, North Carolina adultery and fornication statute, proscribes only continuing or habitual conduct, State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970), and classifies such conduct as a misdemeanor, punishable by six months imprisonment. N.C. G.S. §14-177 proscribes a single act, and makes it a felony punishable by ten years imprisonment. It can hardly be said that the crime against nature statute, as applied to Poe, was motivated by a state interest in deterring extra-marital sex, see Eisenstadt v. Baird, supra, 405 U.S. at 449-50, 92 S.Ct. at 1036. What is offensive to North Carolina is the act itself, and not the fact that it took place between unmarried persons.

For the state to punish Poe for his conduct is to deny him the equal protection of the laws, for there is no rational basis for distinguishing heterosexual fellatio between married persons from heterosexual fellatio between unmarried persons. If there is an evil sufficient to justify state intervention in consensual, heterosexual fellatio, the evil exists whether the actors be married or not, Eisenstadt, supra, 405 U.S. at 454, 92 S.Ct. at 1038.

In the end, North Carolina has no legitimate interest, "compelling" or otherwise, justifying it in imposing criminal sanctions against Poe.

Absent legitimate state interest, a field as delicate and as intensely personal as that of sexual expression ought to be safeguarded against state intrusion. The decision of the North Carolina Court of Appeals gives the state license to tramp wherever it chooses in that field. The Supreme Court of North Carolina has refused to review its decision. Only the Supreme Court of the United States can limit the license given the state.

CONCLUSION

For the reasons set forth above, the Court ought to take jurisdiction and determine the constitutional questions involved.

Dated December 29, 1979.

Respectfully submitted,

WILLIAM V. McPHERSON, JR.
Counsel for Appellant
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Durham, North Carolina 27702
Telephone: (919) 682-5403

CERTIFICATE OF SERVICE

I, WILLIAM V. McPHERSON, JR., a member of the Bar of the Supreme Court of the United States, and counsel of record for JERRY LEANDER POE, appellant herein, hereby certify that on December 29TH, 1979, pursuant to Rule 33 of the Rules of the Supreme Court, I served a copy of the foregoing Jurisdictional Statement on the State of North Carolina, appellee, by depositing a copy thereof in the United States Mails, postage prepaid, duly addressed to

Honorable Rufus L. Edmisten, Attorney General
By: James Peeler Smith, Esquire
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina

This 29TH day of December, 1979.

WILLIAM V. McPHERSON, JR.

NO. 7814SC550

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 1979

FILED
1979 MAR 20 AM 8 07
IN THE OFFICE OF THE
CLERK COURT OF APPEALS
OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

JERRY LEANDER POE

Durham County
No. 77CRS26[illegible]

Appeal by defendant from Hobgood, Judge. Judgment entered 31 January 1978 in Superior Court, Durham County. Heard in the Court of Appeals 17 October 1978.

This is an appeal by the defendant from a conviction of the crime against nature. The defendant, a male person, was charged with the rape of a female person and committing a crime against nature with her. At the end of the State's evidence, the court dismissed the charge of rape. The evidence for the State and defendant showed the prosecuting witness performed a fellatio on the defendant. Defendant's evidence was to the effect that the act was done in private with the consent of both parties, who were adults. The court refused the request of the defendant to charge the jury that if the act was done in private between two consenting adults, the defendant would be not guilty. The defendant was found guilty and from the imposition of a prison sentence, he has appealed.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Upchurch, Galifianakis and McPherson, by William V. McPherson, Jr., for defendant appellant.

WEBB, Judge.

G.S. 14-177 provides:

> If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court.

APPENDIX A

The defendant advances three arguments as to why the trial in the superior court should be reversed. These are: (1) the crime against nature does not include a consensual fellatio between an adult man and adult woman, (2) defendant may not be prosecuted for a consensual fellatio with an adult female because to do so violates his constitutionally guaranteed right of privacy, and (3) the statute as applied to the defendant is unconstitutionally vague. We discuss the arguments in order.

(1) The crime against nature includes a consensual fellatio between a man and a woman.

The defendant urges this Court to define a crime against nature so as not to include an act between an adult man and an adult woman if no force is used. We decline to do so. In State v. Jernigan, 255 N.C. 732, 122 S.E. 2d 711 (1961), the Court said by way of dictum that force was not an essential element of the crime against nature when committed between a man and a woman. It is said at 81 C.J.S., Sodomy, § 5, at page 653, "Thus, the offense of sodomy may be committed with the consent of both parties, and without compulsion or force." We believe we would be changing a definition of a crime which has stood for many years if we followed the suggestion of the defendant, and this we cannot do.

(2) The defendant's right of privacy does not prevent his prosecution under G.S. 14-177.

The defendant contends that the right of privacy which he has under the United States Constitution protects him from prosecution in this case. He argues that Griswold V. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965) enunciated a constitutionally protected right of privacy in sexual relations between married persons and that Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972) extended the same right of privacy to unmarried persons. The appellant cites authority that a state may not punish married persons for sodomic acts committed within the marriage. 58 A.L.R. 3d 636 (1974); State v.Lair, 62 N.J. 388, 301 A. 2d 748 (1973); Cotner v. Henry, 394 F. 2d 873 (7th Cir. 1968), cert. denied, 393 U.S. 847, and Lovisi v. Slayton, 539 F. 2d 349 (4th Cir. 1976), cert. denied, 429 U.S. 977. The appellant argues that the United States Supreme Court has held in Eisenstadt that unmarried persons have the same right of privacy in sexual relations as married persons. He argues further that the

right of privacy prohibits the prosecution of married persons for fellatio done in private. He concludes the right of privacy prohibits the prosecution of unmarried persons for consensual fellatio done in private. The appellant's position depends on the interpretation of the Eisenstadt case. In Griswold v. Connecticut, supra, it was held there is a zone of privacy protected by several constitutional guarantees; that within this zone is the sexual relationship between the husband and wife, and it violates this right of privacy to convict a third person for prescribing a contraceptive for the wife. In Eisenstadt v. Baird, supra, the Court interpreted this right of sexual privacy as it applied to unmarried persons. In that case the defendant was convicted under a Massachusetts statute which prohibited the distribution of contraceptives to unmarried persons to prevent pregnancy. The statute did not prohibit the distribution of contraceptives to anyone for the purpose of preventing the spread of disease. The United States Supreme Court interpreted the Massachusetts law not as an attempt to discourage premarital sex, but as an effort to prevent the use of contraceptives. The Court held that under the Fourteenth Amendment, there was not a rational basis for the class created by this statute. As we read Eisenstadt, it holds that if the state is not trying to proscribe premarital sex but is attempting to stop the use of contraceptives by unmarried but not by married persons, the equal protection clause extends the right of privacy of married persons to unmarried persons. We do not believe Eisenstadt protects the defendant in this case. In this case the state has proscribed certain sexual conduct. In Eisenstadt sexual conduct was not proscribed, but merely the use of contraceptives while engaging in that conduct by unmarried persons. The Court held that was an unreasonable classification. Conceding for purposes of argument that a husband or wife could not be prosecuted for engaging in fellatio in private with his or her spouse, we do not believe it creates an unreasonable class to treat unmarried persons differently. The state can forbid certain types of sexual conduct. The statute under which the defendant was prosecuted

forbids homosexual as well as heterosexual unnatural sex acts. It has been upheld as to homosexual acts. See State v. Enslin, 25 N.C. App. 652, 214 S.E. 2d 318, appeal dismissed, 288 N.C. 245 (1975), cert. denied sub nom. Enslin v. North Carolina, 425 U.S. 903, aff'd sub nom. Enslin v. Wallford, No. 77-1309 (4th Cir. Nov. 1, 1977). In this state, fornication and adultery have been proscribed since at least 1805, G.S. 14-184. We believe the state, consistent with the Fourteenth Amendment, can classify unmarried persons so as to prohibit fellatio between males and females without forbidding the same acts between married couples. We hold that the constitutional right of privacy does not protect the defendant in this case.

(3) The statute is not unconstitutionally vague.

The defendant argues that the statute is unconstitutionally vague.

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
>
> * * *
>
> . . . If a statute is so designed that persons of ordinary intelligence who would be law abiding can tell what conduct must be to conform to its requirements and it is susceptible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attack for vagueness." 16 Am. Jur. 2d, Constitutional Law, § 552, pp. 951-52.

In interpreting a statute, we must incorporate in it decisions interpreting that statute. See Perkins v. State, 234 F. Supp. 333 (W.D.N.C. 1964). The defendant concedes in his brief that State v. Fenner, 166 N.C. 247, 80 S.E. 970 (1914) and State v. Griffin, 175 N.C. 767, 94 S.E. 678 (1917) are "perhaps sufficiently broad to cover consensual heterosexual fellatio" as proscribed by the statute. We do not rest on this. We believe that persons of ordinary intelligence would conclude a fellatio between a man and a woman would be classified as a crime against nature and forbidden by G.S. 14-177. This keeps it from being unconstitutionally vague.

No error.

Judges MORRIS (now Chief Judge) and VAUGHN concur.

SUPREME COURT OF NORTH CAROLINA

Spring Term 1979

****

STATE OF NORTH CAROLINA

v

JERRY LEANDER POE

JUDGMENT DISMISSING APPEAL AND DENYING PETITION FOR DISCRETIONARY REVIEW

(7814SC550)

****

This matter came on to be considered upon Defendant's notice of appeal from the North Carolina Court of Appeals pursuant to G.S. 7A-30, and petition for discretionary review pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in Conference, this 25th day of September 1979, that the petition for discretionary review be denied, that the appeal be dismissed, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ Carlton, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 2d day of October, 1979.

John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
James Peeler Smith, Assistant Attorney General
William V. McPherson, Jr., Attorney at Law
Dan Edwards, District Attorney
Clifton Knight, Clerk of Superior Court

APPENDIX B

A TRUE COPY
JOHN R. MORGAN
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
BY Terry E. Watkins
DEPUTY CLERK
October 3 19 79

GENERAL COURT OF JUSTICE STATE OF NORTH CAROLINA

IN THE COURT OF APPEALS

THE STATE OF NORTH CAROLINA
-vs-
JERRY LEANDER POE, DEFENDANT

No. 78145c550

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

FILED
1979 DEC 28 PM 4:50
IN THE COURT OF APPEALS
CLERK COURT OF APPEALS
OF NORTH CAROLINA

I. NOTICE IS HEREBY GIVEN that Jerry Leander Poe, the appellant above named, hereby appeals to the Supreme Court of the United States, from the final judgment of the Supreme Court of North Carolina dismissing his appeal from the Court of Appeals and denying his petition for discretionary review, entered on October 2, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Appellant was convicted of crime against nature in violation of G.S. §14-177; was sentenced to confinement in the State Department of Corrections; and is presently confined at Central Prison in Raleigh.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Record on appeal;
2. Defendant-Appellant's brief;
3. Brief for the State;
4. Opinion of the Court of Appeals;
5. Notice of appeal and petition for discretionary review to the Supreme Court of North Carolina;
6. Response of the State to the said notice and petition;
7. Judgment of the Supreme Court dismissing the appeal and denying the petition;
8. The certification by the Court of Appeals of the said judgment of the Supreme Court to the Clerk of Superior Court of Durham County; and
9. This notice of appeal.

APPENDIX C

III. The following question is presented by this appeal:

1. Whether G.S. §14-177 is unconstitutional for the reason that, as construed to impose criminal liability upon Poe for engaging in a private consensual act of fellatio with a woman, it violates his right of privacy guaranteed under the Fourteenth Amendment and other amendments to the United States Constitution.

This 28th day of December, 1979.

William V. McPherson, Jr.

WILLIAM V. McPHERSON, JR.
Attorney for Jerry Leander Poe, Appellant
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P.O. Box 1611/200 First Union Building
Durham, North Carolina 27702
Telephone: (919) 682-5403

CERTIFICATE OF SERVICE

I, WILLIAM V. McPHERSON, JR., a member of the Bar of the Supreme Court of the United States, and counsel of record for JERRY LEANDER POE, appellant herein, hereby certify that on December 28TH, 1979, pursuant to Rule 33 of the Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, on the State of North Carolina, appellee, by depositing a copy thereof in the United States Mails, postage prepaid, duly addressed to

Honorable Rufus L. Edmisten, Attorney General
By: James Peeler Smith, Esquire
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina.

This 28TH day of December, 1979.

William V. McPherson, Jr.

WILLIAM V. McPHERSON, JR.

NO. 7814SC550

79-5[illegible]

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 1979

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79 MAR 20 AM 8:07
IN THE OFFICE OF THE CLERK COURT OF APPEALS OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

JERRY LEANDER POE

Durham County
No. 77CRS26792

Appeal by defendant from Hobgood, Judge. Judgment entered 31 January 1978 in Superior Court, Durham County. Heard in the Court of Appeals 17 October 1978.

This is an appeal by the defendant from a conviction of the crime against nature. The defendant, a male person, was charged with the rape of a female person and committing a crime against nature with her. At the end of the State's evidence, the court dismissed the charge of rape. The evidence for the State and defendant showed the prosecuting witness performed a fellatio on the defendant. Defendant's evidence was to the effect that the act was done in private with the consent of both parties, who were adults. The court refused the request of the defendant to charge the jury that if the act was done in private between two consenting adults, the defendant would be not guilty. The defendant was found guilty and from the imposition of a prison sentence, he has appealed.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Upchurch, Galifianakis and McPherson, by William V. McPherson, Jr., for defendant appellant.

WEBB, Judge.

G.S. 14-177 provides:

> If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court.

The defendant advances three arguments as to why the trial in the superior court should be reversed. These are: (1) the crime against nature does not include a consensual fellatio between an adult man and adult woman, (2) defendant may not be prosecuted for a consensual fellatio with an adult female because to do so violates his constitutionally guaranteed right of privacy, and (3) the statute as applied to the defendant is unconstitutionally vague. We discuss the arguments in order.

(1) The crime against nature includes a consensual fellatio between a man and a woman.

The defendant urges this Court to define a crime against nature so as not to include an act between an adult man and an adult woman if no force is used. We decline to do so. In State v. Jernigan, 255 N.C. 732, 122 S.E. 2d 711 (1961), the Court said by way of dictum that force was not an essential element of the crime against nature when committed between a man and a woman. It is said at 81 C.J.S., Sodomy, § 5, at page 653, "Thus, the offense of sodomy may be committed with the consent of both parties, and without compulsion or force." We believe we would be changing a definition of a crime which has stood for many years if we followed the suggestion of the defendant, and this we cannot do.

(2) The defendant's right of privacy does not prevent his prosecution under G.S. 14-177.

The defendant contends that the right of privacy which he has under the United States Constitution protects him from prosecution in this case. He argues that Griswold V. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965) enunciated a constitutionally protected right of privacy in sexual relations between married persons and that Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972) extended the same right of privacy to unmarried persons. The appellant cites authority that a state may not punish married persons for sodomic acts committed within the marriage. 58 A.L.R. 3d 636 (1974); State v.Lair, 62 N.J. 388, 301 A. 2d 748 (1973); Cotner v. Henry, 394 F. 2d 873 (7th Cir. 1968), cert. denied, 393 U.S. 847, and Lovisi v. Slayton, 539 F. 2d 349 (4th Cir. 1976), cert. denied, 429 U.S. 977. The appellant argues that the United States Supreme Court has held in Eisenstadt that unmarried persons have the same right of privacy in sexual relations as married persons. He argues further that the

right of privacy prohibits the prosecution of married persons for fellatio done in private. He concludes the right of privacy prohibits the prosecution of unmarried persons for consensual fellatio done in private. The appellant's position depends on the interpretation of the Eisenstadt case. In Griswold v. Connecticut, supra, it was held there is a zone of privacy protected by several constitutional guarantees; that within this zone is the sexual relationship between the husband and wife, and it violates this right of privacy to convict a third person for prescribing a contraceptive for the wife. In Eisenstadt v. Baird, supra, the Court interpreted this right of sexual privacy as it applied to unmarried persons. In that case the defendant was convicted under a Massachusetts statute which prohibited the distribution of contraceptives to unmarried persons to prevent pregnancy. The statute did not prohibit the distribution of contraceptives to anyone for the purpose of preventing the spread of disease. The United States Supreme Court interpreted the Massachusetts law not as an attempt to discourage premarital sex, but as an effort to prevent the use of contraceptives. The Court held that under the Fourteenth Amendment, there was not a rational basis for the class created by this statute. As we read Eisenstadt, it holds that if the state is not trying to proscribe premarital sex but is attempting to stop the use of contraceptives by unmarried but not by married persons, the equal protection clause extends the right of privacy of married persons to unmarried persons. We do not believe Eisenstadt protects the defendant in this case. In this case the state has proscribed certain sexual conduct. In Eisenstadt sexual conduct was not proscribed, but merely the use of contraceptives while engaging in that conduct by unmarried persons. The Court held that was an unreasonable classification. Conceding for purposes of argument that a husband or wife could not be prosecuted for engaging in fellatio in private with his or her spouse, we do not believe it creates an unreasonable class to treat unmarried persons differently. The state can forbid certain types of sexual conduct. The statute under which the defendant was prosecuted

forbids homosexual as well as heterosexual unnatural sex acts. It has been upheld as to homosexual acts. See State v. Enslin, 25 N.C. App. 682, 214 S.E. 2d 318, appeal dismissed, 288 N.C. 245 (1975), cert. denied sub nom. Enslin v. North Carolina, 425 U.S. 903, aff'd sub nom. Enslin v. Wallford, No. 77-1309 (4th Cir. Nov. 1, 1977). In this state, fornication and adultery have been proscribed since at least 1805. G.S. 14-184. We believe the state, consistent with the Fourteenth Amendment, can classify unmarried persons so as to prohibit fellatio between males and females without forbidding the same acts between married couples. We hold that the constitutional right of privacy does not protect the defendant in this case.

(3) The statute is not unconstitutionally vague.

The defendant argues that the statute is unconstitutionally vague.

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
>
> * * *
>
> . . . If a statute is so designed that persons of ordinary intelligence who would be law abiding can tell what conduct must be to conform to its requirements and it is susceptible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attack for vagueness." 16 Am. Jur. 2d, Constitutional Law, § 552, pp. 951-52.

In interpreting a statute, we must incorporate in it decisions interpreting that statute. See Perkins v. State, 234 F. Supp. 333 (W.D.N.C. 1964). The defendant concedes in his brief that State v. Fenner, 166 N.C. 247, 80 S.E. 970 (1914) and State v. Griffin, 175 N.C. 767, 94 S.E. 678 (1917) are "perhaps sufficiently broad to cover consensual heterosexual fellatio" as proscribed by the statute. We do not rest on this. We believe that persons of ordinary intelligence would conclude a fellatio between a man and a woman would be classified as a crime against nature and forbidden by G.S. 14-177. This keeps it from being unconstitutionally vague.

No error.

Judges MORRIS (now Chief Judge) and VAUGHN concur.

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CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA

DEPUTY CLERK

NO. 7814SC550

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA

v

JERRY LEANDER POE

County: Durham
Number: 77CRS26792

79-5877

****

Appeal to review the decision of the Court of Appeals filed on 20 March 1979 was dismissed and petition for Discretionary Review was denied by order of the Supreme Court of North Carolina in Conference on the 25th day of September, 1979 and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Durham Superior Court that the Supreme Court of North Carolina has dismissed the Appeal and denied the petition for Discretionary Review in this cause.

Witness my hand and official seal this the 5th day of October, 1979.

Dilly D. Tyson
Deputy Clerk
Court of Appeals

A TRUE COPY
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA
By Dilly D. Tyson
DEPUTY CLERK
3 December 79

COA - 52B

No. 130PC

FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1979

****

STATE OF NORTH CAROLINA

v

JERRY LEANDER POE

JUDGMENT DISMISSING APPEAL AND DENYING PETITION FOR DISCRETIONARY REVIEW

(7814SC550)

****

This matter came on to be considered upon Defendant's notice of appeal from the North Carolina Court of Appeals pursuant to G.S. 7A-30, and petition for discretionary review pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in Conference, this 25th day of September 1979, that the petition for discretionary review be denied, that the appeal be dismissed, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ Carlton, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 2d day of October, 1979.

John R. Morgan
John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
James Peeler Smith, Assistant Attorney General
William V. McPherson, Jr., Attorney at Law
Dan Edwards, District Attorney
Alton Knight, Clerk of Superior Court

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CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA
By Dilly D. Tyson
DEPUTY CLERK
3 December 79

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JOHN R. MORGAN
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
By Terry E. Walker
DEPUTY CLERK
October 3 19